Lot 42867 was sold for $70.40. From then onwards throughout the year there had been fluctuations in price, the highest being $49.96 in October.

For these reasons I cannot accept the six lots sold 10 months later as comparables. The fluctuations in price shown in the above table must rebut any suggestion of a rising trend in prices at the time. The superintendent has awarded a sum of $111,000 for Lot 27830, that is, $70 per square foot. For reasons I have indicated, this is an adequate award.

I observe that Mr. Jee said that if he had to value the building the highest price would be $2,816. The superintendent made no award for this as Mr. Jee said it was worth nothing. It stands on land held under an open title and used as a grocer's shop. In my opinion, an award should be made in respect of the building. The sum of $2,300 awarded by the learned judge is a fair figure.

As regards Lot 21842, the only evidence of comparable sales would be the sales shown in the second table I have set out. They are all held under a similar title. In the year 1968 the highest price obtained was $62.50 for Lot 1363 on 5th January 1968. In April, Lot 1371 could only fetch $18.20. In December the price was $60.50 for Lot 1364. In the circumstances the superintendent's award of $274,000, that is, $65 per square foot is adequate.

In the result the appeal is allowed. I set aside the award made by the learned judge with this variation that the award of $2,300 for the building on Lot 27830 remains. I restore the award of $111,000 by the superintendent for Lot 27830. I direct that the two said sums be paid to the first respondent, less any sum paid by the superintendent, if any. I restore the award of $267,000 by the collector for Lot 21842, and I direct that this sum be paid to the second respondent if it had not already been paid.

I also direct that interest be paid on the said sum of $2,300 to the first respondent at the rate of 4% per annum in accordance with section 69 of the Land Code.

The order of the learned judge as to costs is set aside.

The appellant will have his costs of this appeal and in the court below.

Azmi L.P. and Yong J. concurred.

Appeal allowed.

MAHON v. MAHON

[O.C.J. (Ong Hock Sim J.) March 3, 1971]

[Penang — Divorce Petition No. 23 of 1970]

Family Law — Divorce — Application by wife — Domicil — Jurisdiction — Whether wife "ordinarily resident" in Malaysia — Divorce Ordinance, 1952, s. 49(1).

In this case the petitioner applied for dissolution of her marriage with the respondent. The parties were domiciled in Ireland but the petitioner claimed that she was ordinarily resident in Malaysia for the last three years immediately preceding the commencement of the proceedings. On the facts although the petitioner had resided in Penang she was absent in Ireland for about 15 months out of the preceding 36 months. The petitioner owned a furnished dwelling in Dublin and had a half share in another house in Dublin. The children of the marriage were living in Ireland and the petitioner said that she intended to return and settle down in Ireland with her children after the conclusion of the proceedings.

Held: in view of the domicil of the parties and the fact that they have no house of their own in this country and their clear intention to return to their country of origin, it could not be said that the petitioner was "ordinarily resident" in the Federation and therefore the petition must be dismissed for lack of jurisdiction.

Cases referred to:-

(1) *Hopkins* v. *Hopkins* [1950] 2 All E.R. 1035.

(2) *Macrae* v. *Macrae* [194] 2 All E.R. 34; [1949] P. 397.

DIVORCE PETITION.

Lim Kean Siew for the petitioner.

S. Thillaimuthu for the respondent.

Ong Hock Sim J.: The petitioner is suing the respondent for a dissolution of her marriage and other incidental or ancilliary reliefs. The fact that a petition for divorce is not defended does not necessarily mean that the relief would automatically be granted. Divorce involves the severance and dissolution of the marriage bond. It involves further a change of status. The court should itself be mindful whether it has jurisdiction to entertain the petition.

The parties were married at the Church of St. Josephs in the Parish of Tramore and Carbally in Ireland on the 4th day of July, 1955. The petition states in paragraph 6 that "the petitioner and the respondent are not domiciled in Malaya" but from the facts set out, I think I could safely infer that their domicil is in Ireland, which has not been changed by any acquisition of a domicil of choice. The petition is filed pursuant to section 49(1)(b) of the Divorce Ordinance (No. 74 of 1952) and I quote:

"49(1) Without prejudice to any jurisdiction exercisable by the court apart from this section, and notwithstanding the provisions of paragraph (b) of sub-section (1) of section 4, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in the Federation, that is to say:—

(b) in the case of proceedings for divorce or nullity of marriage and any proceedings consequent thereupon, if the wife is resident in the Federation and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings."

The basis for invoking the jurisdiction of this court therefore is that the petitioner has been ordinarily

resident in this country for the three years immediately preceding the commencement of these proceedings. There can be no dispute that she is resident here at the date of filing of the petition. It is stated in paragraph 5 of the petition that during the three years immediately preceding the commencement of the proceedings the petitioner has resided at No. 3 Western Avenue, Penang. Upon the pleadings, however, I find that there were periods of absence from this country, namely, an indeterminate period in December 1968 according to paragraph 15(a) of the petition when the parties lived presumably in their home in Ireland, and the period from the 14th December, 1969 to the 9th July, 1970 when the petitioner was in Ireland. I think the period from December 1968 up to July 1969 from my inspection of the petitioner's passport would add up to a period of about 7 months which, with the period of absence from the 14th December, 1969 to July 1970, would be a total absence of about 15 months out of the preceding 36 months.

Affidavits by both petitioner and respondent filed in connection with this petition showed that they have an equal share in a house at Knockmoulds situate in Swords County, Dublin, and also that petitioner owned a fully furnished dwelling No. 52, Frankfort Avenue, Dublin. The children of the marriage were presently living in Ireland. Having regard to the domicil and to the petitioner's statement in her affidavit that "I have given notice that I will cease employment in my school immediately this petition is settled as I have to return and settle down in Ireland with my children after conclusion of these proceedings," I have now to consider whether, despite the periods of absence to which I have earlier referred, the petitioner can be said to have been ordinarily resident in this country during the three years immediately preceding the petition. I think the court should be chary of arrogating to itself jurisdiction in matters affecting status, such as a dissolution of marriage involves. The case of *Hopkins* v. *Hopkins*[1] is, in my view, directly in point. The facts therein may shortly be stated as follows. The parties were married on 11th September, 1943. The husband was born in Eire in 1920 but came to England in 1939 where he obtained a commission in the Fleet Air Arm. A week after the marriage, the husband went abroad on active service and returned to England in 1945. He remained in England till 2nd February, 1949 when he flew to Canada with the object of obtaining employment there. The wife remained behind in England until April 15th, 1949 when she accompanied her husband, who had returned in March, to Canada. While in Canada, the parties had no home of their own in England. On obtaining employment in May 1949, the husband contemplated settling there and on 1st September, 1949, took a yearly tenancy of a bungalow in which they lived. On 22nd September, 1949, the wife returned to England and filed a petition for divorce on 11th October, 1949. One of the questions for determination, as Pilcher J. said, was "if the husband had at the material date a Canadian domicil of choice, is it established that the wife was "ordinarily resident" in England for the three years immediately preceding the commencement of these proceedings." At page 1037, Pilcher J. quoted section 1(1)(a) of the Law Reform (Miscellaneous Provisions) Act 1949:

"The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if (a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings."

which is identical to our section, and went on to say:

"The wife was clearly resident in England when she commenced these proceedings and the facts with regard to their residence during the three preceding years are not in doubt. Apart from a fortnight's holiday in Jersey in May, 1948, and one very short visit to the continent, the wife's residence during the material period, and, so far as I know, throughout her life, has been in England, except when she went to Canada with her husband. She arrived in Canada on April 15, 1949, and left Canada on September 20, 1949. It would, I think, be impossible to say that during these five months she was resident anywhere other than in Canada. During this period she was living in Canada with her husband, and neither she nor her husband had any home of their own in England. It follows that for thirty-one months out of the material thirty-six months immediately preceding the commencement of the proceedings the wife was resident in England, and for the remaining five months she was resident in Canada. If this be so, it is clear that the wife cannot say that she was resident in England for the necessary three years preceding the commencement of the proceedings. Can she contend successfully, that, although in fact resident in Canada for five months out of the material thirty-six, she was none the less 'ordinarily resident' throughout the whole period in England? This is not a case in which it can be, or is, contended that the wife had at the same time two physical residences, in either of which it was open to her to reside at will. In fact, on my findings she was, after her husband's determination to settle in Canada crystallised, not only resident but in law domiciled in Canada. On this state of facts, giving to the words 'ordinarily resident.. for a period of three years immediately preceding the commencement of the proceedings' what I conceive to be their ordinary and natural meaning, I should have found it difficult to hold that the petitioner had brought herself within the words of the section."

At page 1039, he went on to say:

"My own view is that, on the facts of the case, and giving to the words 'ordinarily resident' their natural meaning, the wife was, while physically present in Canada, 'ordinarily resident' there. She was clearly resident there, and to find that she was also, during the period of her stay, 'ordinarily resident' there involves a conclusion that — on the facts of this particular case, at least — the qualifying adverb 'ordinarily' adds nothing to the adjective 'resident'. Such a conclusion accords with the view taken by the highest tribunal in the country when called on to construe identical and similar words in the revenue Acts, and also accords with the view of the meaning of the words taken by Somervell L.J. in *Macrae* v. *Macrae*.[2] It follows that, if the wife was ordinarily resident in Canada during her five months' sojourn, then she was not 'ordinarily resident' in England during the three years preceding the commencement of the proceedings, and that this court has no jurisdiction to entertain her suit under the provisions of s.1(1)(a) of the Law Reform (Miscellaneous Provisions) Act, 1949."

In view of their domicil and the fact that the parties have no home of their own in this country and their intention clearly to return to their country of origin, I find it would be stretching the ordinary meaning of words to say that during her periods of absence in Ireland for about fifteen months, the petitioner was nonetheless "ordinarily resident" in the Federation. I hold therefore that the petitioner has

not fulfilled the conditions precedent to the exercise of jurisdiction by this court in terms of section 49(1)(b). The petition is therefore dismissed.

Petition dismissed.

Solicitors: *Lim Kean Siew & Co.; S. Thillaimuthu.*

HONG KIM SUI & ANOR. v. MALAYAN BANKING BHD.

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Yong J.) March 4, 1971]

[Kota Kinabalu — Federal Court Civil Appeal No. 5 of 1970]

Practice and Procedure — Judgment — Order of judge giving leave to enter final judgment — Whether final judgment — Appeal therefrom — Form of notice of appeal — No address for service given on notice of appeal — Whether mere irregularity — Federal Court (Civil Appeals) (Transitional) Rules, 1963, r. 6(3) — Courts of Judicature Act, 1964, s. 68(2).

In this case the respondents had obtained an order giving them leave to enter final judgment against the appellants. The appellants filed a notice of appeal against the order. The respondents applied to have the notice of appeal set aside on the following grounds: (1) the judgment of the court being an interlocutory judgment, the appellants should have applied to the trial judge for further arguments in open court under the provisions of section 68(2) of the Courts of Judicature Act; (2) the notice of appeal was not in the form required by rule 6(3) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963; (3) the appellants had failed to give their or their solicitor's address on the notice of appeal for the purposes of service.

Held: (1) the order of the learned trial judge in this case was a final order and not an interlocutory order, and therefore the provisions of section 68(2) of the Courts of Judicature Act were not applicable;

(2) the failure to use the form required by rule 6(3) of the Federal Court (Civil Appeals) (Transitional) Rules was in this case a mere irregularity which did not render the proceedings void;

(3) the failure to give the address of the appellants or their solicitors was in this case a mere irregularity;

((4) leave should be given to the appellants to amend their notice of appeal to comply with rule 6 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963.

Cases referred to:-

(1) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad Sulaiman (No. 2)* [1970] 1 M.L.J. 253.

(2) *Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547.

(3) *Ratnam* v. *Cumarasamy & Anor.* [1962] M.L.J. 330.

(4) *Lopez* v. *Valliappa Chettiar* [1968] 1 M.L.J. 224, 227.

(5) *Hoerler* v. *Hanover Chaoutchouc etc. Co.* (1893) 10 T.L.R. 22.

FEDERAL COURT.

Shelley Yap Yeok Siew for the appellants.

Hawkins for the respondents.

Cur. Adv. Vult.

Azmi L.P.: The plaintiffs, the Malayan Banking Berhad, obtained leave under O. 14 r. 1 of the Rules of the Supreme Court from the High Court to sign final judgment against the defendants for the sum of $270,000 and interest etc. On the same day the order was drawn up and entered. About two days later, the defendants filed a notice of appeal against that order and a copy of it was served on the plaintiffs' solicitors. The plaintiffs now applied to us to have the notice of appeal set aside on four grounds. The first and main ground is that the judgment of the court being an interlocutory judgment, the defendants should have applied to the trial judge for further arguments in open court under the provisions of section 68(2) of the Courts of Judicature Act.

That sub-section reads as follows: —

"(2) No appeal shall lie from an interlocutory order made by a judge of the High Court in chambers, unless the Judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further arguments, or unless leave is obtained from the Federal Court or from a Judge of the High Court."

The defendants had neither applied for a certificate from the judge that he required no further arguments, nor did they obtain leave from the judge or the Federal Court.

Counsel for the plaintiffs maintained that the order of the Judge giving leave to the plaintiffs to enter final judgment was an interlocutory order. On the other hand, counsel for the defendants submitted that this was a final order and in support of his argument read to us a passage from *Halsbury's* Laws of England, 3rd Edition, Vol. 22 page 742, paragraph 1060 and the comment of the learned editors at the footnote on the same page to the effect that the cases on the subject are not easy to reconcile.

The question has, however, been decided in the Federal Court in *Peninsular Land Development Sendirian Berhad* v. *K. Ahmad Sulaiman (No. 2)*[1]. In that case the Federal Court decided that the order of the court giving leave to the respondent to sign final judgment on a specially indorsed writ was a final judgment. As a matter of fact, I wrote the judgment of the Federal Court and in coming to the conclusion I had adopted the following test expressed by Lord Alverstone C.J. in *Bozson* v. *Altrincham Urban District Council*[2]: —

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the right of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

In adopting the test I was merely following the Malayan Court of Appeal in *Ratnam* v. *Cumarasamy & Anor.*[3] The question the Court of Appeal had to consider there was whether an order refusing extension of time to file record of appeal was final or not for the purposes of appeal under section 31(1) of the Appeals from the Supreme Court Ordinance 1958. In that case, the Court of Appeal applied the test enunciated by Lord Alverstone in *Bozson* v. *Altrincham Urban District Council, supra,* and the Privy Council in *Lopez* v. *Valliappa Chettiar*[4] expressed the view that *Ratnam* v. *Cumarasamy & Anor.* was decided on the right basis. For the above reasons I would therefore hold